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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

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JOHN CADEZ, JR. and JAMES CADEZ,
a partnership, doing business as
CENTRAL DISTRIBUTING COMPANY,

*Petitioners,*

vs.

GENERAL CASUALTY COMPANY OF AMERICA and
GENERAL INSURANCE COMPANY OF AMERICA,

*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.**

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JAMES CADEZ, *Petitioners*

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ERRATA:

(to come)

IN THE

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OCTOBER TERM, 1961

No. .....

JOHN CADEZ, JR. and JAMES CADEZ,
a partnership, doing business as
CENTRAL DISTRIBUTING COMPANY,

*Petitioners,*

vs.

GENERAL CASUALTY COMPANY OF AMERICA and
GENERAL INSURANCE COMPANY OF AMERICA,

*Respondents.*

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on November 15, 1961.

## OPINIONS BELOW

The opinion of the District Court for the District of Colorado in allowing respondents' motion for a directed verdict at the close of evidence to a jury was rendered orally and is not reported. The opinion appears in the

record (R. 39-42),[1] nine copies of which have been filed with this petition thereby excusing inclusion in the Appendix [Rule 23(1)(f)]. The opinion of the Court of Appeals (Tr. 3) announced November 15, 1961, is not yet reported; and a copy thereof is appended hereto as Appendix A, pp. 22, *infra*.

## JURISDICTION

The judgment of the Court of Appeals was dated and entered on November 15, 1961 (Tr. 4), and a copy thereof is appended to this petition as Appendix B at p. 26. A petition for rehearing (Tr. 5) was denied on December 12, 1961 (Tr. 6). The jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1254(1) providing for the granting of a writ of certiorari upon the petition of any party to the case after rendition of judgment by the Court of Appeals.

## QUESTIONS PRESENTED FOR REVIEW

Petitioners (plaintiffs below and hereafter also called insureds) sought to recover from the respondents (defendants below and hereafter also called the insurers) the sum of $21,646.25 in an action of tort for damages suffered by insureds on account of the negligence of the insurers in failing to provide requested coverage, by misrepresenting the adequacy of the coverage as written, and by failing to advise insureds of the inadequacy of their coverage with respect to employers' liability insurance.

A factual synopsis discloses that the insurers had a confessed and self-assumed duty through their agent to

[1] References to Rules will be to Rules of this Court; (Tr. ) will refer to the transcript of the record from the Court of Appeals; (R. ) will refer to the record in the trial court certified and printed for use in the Court of Appeals (that record is incorporated by reference in page 2 of the Transcript); and (App. ) will refer to the matter in the Appendix attached hereto.

survey the need for, advise with respect to, and provide, necessary insurance; the insureds owned a small business employing 3 to 9 employees, and entrusted the protection from the perils of the risks of their business to agents of the insurers; the insurers' duly licensed local agent, provided the insurance and continuously represented to the insureds that they were "fully covered" and were covered to "the full extent of the law of Colorado"; the insurers had knowledge (App. A. 26) that the number of employees subjected the insureds to the provisions of the Colorado Workmen's Compensation Law; the insurers collected a premium sufficient to provide coverage under said Law but, instead, issued and kept in force employers liability insurance containing an exclusion of liability under "any Workmen's Compensation Law"; and that an injury to an employee resulted in an uninsured loss of $21,046.25. The trial court entered judgment (R.10) for respondents on their motion for a directed verdict and, on petitioners' appeal, the Court of Appeals affirmed.

The questions raised by this petition are:

1. Whether the judgments of the District Court and Court of Appeals, reached by importing doctrines from the law of contracts to thwart an action of tort, so far impair the soundness of the juridical process of the Tenth Circuit and the progressive development of the law as to call for the exercise of the supervisory powers of this Court;

2. Whether the District Court and the Court of Appeals can abrogate duties, not offensive to public policy, voluntarily undertaken by the insurers to advise with respect to adequate coverage, and to provide it, in transactions with the insureds; and

3. Notwithstanding the judicial power to abrogate duties, not offensive to public policy and voluntarily undertaken by the insurers, may the District Court and the Court of Appeals exercise such power when to do so is to grant immunity to private, profit-seeking insurers from liability

for the torts of their agent in contravention of Article II, Section 3 of the Constitution of Colorado?

## STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The state constitutional and statutory provisions which are relevant to decision herein, and the pertinent text of which is set forth in Appendix C hereto, are Article II, Section 3 of the Colorado Constitution; and C.R.S. 53,[2] Sections 72-1-18 and 72-1-25 (1961 Supp.).

## STATEMENT OF THE CASE

The plaintiffs-insureds initiated this cause in a court of competent jurisdiction in their domiciliary State of Colorado; and the defendant-insurers removed the action to the United States District Court for the District of Colorado by petition alleging diversity of citizenship and the requisite jurisdictional amount pursuant to 28 U.S.C. Sec. 1332(a)(1) as amended July 25, 1958, 72 Stat., 415 (R. 4-6). By their action, the petitioners sought a declaratory judgment against respondents adjudging them responsible for damages (which proved to be $21,646.25, R. 22) suffered by the petitioners by reason of the negligence of agents of respondents in failing to provide requested insurance coverage, in misrepresenting the adequacy of the insurance coverage provided, and in failing to advise petitioners of the fact, which the agents knew or should have known, that the provided coverage was inadequate (Pleadings, R. 1-4).

A verdict was entered for respondents on their motion; the judgment entered (R. 10) was appealed and was affirmed.

[2] To assure uniformity of our references, we adhere to state practice (sanctioned by statute) in citing to Colorado Revised Statutes Annotated (1953); the Court of Appeals reference is Colo. Rev. Stat. Ann. (1953).

We are not aware of any serious factual dispute in the record: In June, 1958, one Robert E. Hugenot was injured while in the employ of the petitioners. At the time of the injury, the petitioners were insured by the respondents, under an employer's liability policy which excluded coverage of any obligation for which the insureds might be "liable under any Workmen's Compensation Law" (Pl. Ex. A; R. 45-46). The insurers refused to cover the Hugenot claim under the policy and cast the burden on the insureds (R. 22, 23).

At all material times one C. D. Coe was a local agent of the insurers (R. 30, 34; Pl. Ex. E; R. 47-49). At all material times respondents were qualified to write workmen's compensation insurance in Colorado (R. 35, 36; Def. Ex. 2, R. 44). Mr. Coe was licensed by the State of Colorado as an agent of the insurers (R. 35, 36). They sold insurance only through licensed, independent agents (R. 27). One agent for the insurers, testified that "[we], of course, try to sell the man all we can, but not more than we think he needs" (R. 23).

The division manager of the respondent General Insurance Company (R. 27) outlined the practices and duties of the insurers as follows: The insurers' field man introduces new coverages; he assists the agent in determining and meeting the needs of the insured with reference to proper coverage (R. 31). An agent represents the insurers pursuant to a written agency agreement. Plaintiffs' Exhibit E (R. 47-49 was the original and continuing agreement with Coe (R. 20). The average insured is informed as to [illegible] hibit E (R. 47-49, was the original and continuing agreement the insured as far as what the coverage will be" (R. 31). The agency department supervises, or controls the agents (R. 27). The insurance field is very competitive and the advantage of one company over another is principally one of service (R. 28). "The responsibility of the agent is to insure—to be sure that the insured is properly covered. . . . Our job is protection, the agent's job is protection.

Essentially, that is a fair statement" (R. 27, 29). "We consider it the agent's responsibility" to advise an insured with reference to coverage (R. 32).

John Cadez, Sr., age 73, is a naturalized Austrian who completed the sixth grade in school. He bought a wholesale business in 1949 (R. 15) and sold it to his sons, the petitioners, in 1953. The business never had more than 9 employees (Pl. Ex. C; R. 43). Cadez, Sr., bought the first insurance on the business in a policy of the insurers issued in November, 1949. Mr. Coe " . . . wanted to write insurance to cover everything . . . that I wouldn't have to worry about nothing, which he repeatedly said that to me, he done". (R. 15, 17). It was renewed for "another 3 years under the same conditions" in 1952 (R. 18) and again in November, 1955 to expire November 18, 1958;[3] it was countersigned "C. D. Coe . . . Authorized Representative" (Pl. Ex. A; R. 42). The elder Cadez had dealings with no agent other than Coe. Coe was asked to write all insurance father Cadez needed (R. 15-16).

"Shortly after the issuance of the first policy in 1949 and thereafter during all the times involved herein, except the fourth quarter of 1955 and the first quarter of 1957, the business had 4 or more employees" (App. A, p. 23, *infra*; see also, Pl. Ex. C, R. 43).[4]

Father Cadez continued to take care of the insurance end of the business for the petitioners. Mr. Coe, when asked if they were fully covered, assured them that everything was all right and not to worry about the insurance. They relied upon Mr. Coe and the respondents' representatives

[3] The insureds' loss was sustained as a result of an injury to the employee in June, 1958 (R. 22).

[4] "The Colorado law, Colo. Rev. Stat. Ann., sec. 81-2-6 (1953), applies to an employer of 4 or more." App. A, p. 22, n. 1. Once an employer comes under the Workmen's Compensation Act, he remains under it even though later he has fewer than 4 employees (*Comerford v. Carr*, 86 Colo. 590, 284 P. 121) unless he rejects the Act pursuant to provisions of C.R.S. 53, sec. 81-4-2. Neither the insureds nor their father rejected the Act (R. 17, 21-22).

as to the coverage. Mr. Coe told one of the petitioners, and he heard Coe tell his father, that they were fully covered (R. 22).

The Court of Appeals said (App. A, p. 23): "From the evidence the jury could have found that Coe made wrongful representations as to the insurance coverage or erroneously interpreted that coverage."

Coe did not deal with the insureds in accordance with the standards of a reasonably careful and competent insurance agent in Grand Junction (R. 26).

The premium for employer's liability, *solely*, is the same as the premium for workmen's compensation insurance (R. 32; Pl. Ex. F; R. 43). A workmen's compensation policy includes coverage for employer's liability (R. 27; Pl. Ex. H; R. 43).

## REASONS FOR GRANTING THE PETITION.

At the outset, we cannot forbear mentioning the obvious difficulties inherent in our duty to deal with a claim that the lower courts have departed from what we conceive to be accepted and usual standards of adjudication. The task invites charges that we are not objective, that we harbor a feeling of animadversion, that we lack respect for the courts below, or that we are passing judgments on the lower courts in terms and attitudes which invade the province reserved for the exclusive attention of this Court. After allowing for the strain of strong feelings, believe us, none is true; by every word and intendment, we mean to advocate, not aggravate, our cause.

The gravity and the delicacy of two of the questions raised by this petition are such as to require, for them, more than minimum treatment: the supposed standards of adjudication must be amplified to emphasize their validity; and enough of the proceedings in the lower courts set forth to determine fairly whether there were departures, and

whether they were substantial. And now to the reasons for granting the petition.

This petition relates to a matter—casualty insurance—which was described almost a half century ago as "practically a necessity to business activity and enterprise . . . (and) of the greatest public concern." *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 414-415 (1914). Indeed, loss of property may be more serious to some individuals than loss of life itself. However, the concern is more than parochial because, to the extent that our civilization is dependent upon commerce and free enterprise, insurance binds us together in spreading among many the burden of losses suffered by a comparative few. Insurance, also, is probably the most prolific spawner of litigation of the many specific civil relationships possible between one legal entity and another. One treatise on insurance cites reference to more than 85,000 decisions of our state and federal appellate courts.[5]

In addition to general public concern with insurance, the people in the Tenth Circuit, and the bar which serves them, have a vital interest in three questions raised by this petition: two relate to the sufficiency of the adjudicative processes of the federal courts serving Colorado—(1) whether the courts should be permitted to mongrelize the doctrines of contracts and torts[6] and (2) whether the courts can abrogate a duty, not offending public policy, self-imposed on the insurer and its agent—and the third question, of state importance only, relates to whether private, profit-making insurance companies are to be granted immunity from liability for the torts of their agents in contravention of the Constitution of Colorado and the pronouncements of its Supreme Court.

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[5] Appleman, *Insurance Law and Practice*, (1944; and 1961 Supplements) 26 volumes.

[6] "Many things which we take for granted have had to be laboriously fought out or thought out in past times." Holmes, *The Common Law* (1881) [1946 reprint], p. 2.

importing doctrines from the field of contracts to thwart a claim in tort is an erosion of juridical processes and the progressive development of the law contrary to the public interest, especially in the Tenth Circuit.

The Court of Appeals disposed of the appeal on the basis of the rule it laid down in a contract case arising out of New Mexico. *Union Life Ins. Co. v. Burk*, 10th Cir., 169 F2d 235, 239 (App. A. p. 23-4): "We hold that such representations would not bind the company unless they were made within the scope of (the agent's) authority, or, if not warranted by the scope of this authority, they nevertheless came to the notice of the company, and by its subsequent conduct estopped itself to repudiate them."

The rule of contract law out of the *Union Life* case is not suited juridically to set for naught an action of tort based on the same facts of misrepresentation.

The rule plainly gives *contractual* force to the misrepresentations of the agent when made within the scope of his authority, or, if made in excess of his authority, they nevertheless were ratified by the company. But, in the case at bar, the petitioners seek recovery in tort because the agent made repeated material misrepresentations with respect to coverage (6-7 above).

The adjudicatory innovation of the Court of Appeals in lifting rules out of contract cases to do double duty in disposing of tort claims is all the more without warrant when it had available to it appropriate *ratio decidendi* in *Amen v. Black*, 10th Cir., 234 F.2d 12, 20 (1956):

> "The principal is liable to one who relies upon the deceitful representation of the agent, 'if those representations are apparently authorized, or usually accompany or are incidental to transactions which he is authorized to conduct, provided the other party has

no notice that the representations are unauthorized." 2 Am. Jur. Agency, Sec. 362; see also Restatement Agency, secs. 257, 258."[7]

It is one thing to say that a factual situation does, or does not, lead to certain legal consequences when tested by appropriate rules of law; the adjudicatory capacity of the Court of Appeals and the lower court to do this is not in question. But neither court has the capacity to deny a litigant relief from a tort because the facts, when tested by rules of contract law, are found wanting in legal efficacy, although they are sufficient when gauged by rules of tort.[8]

The decision of the Court of Appeals sought to be reviewed, in this instance, at least, runs counter to the legacies of three judicial primates that "liberated bar and bench . . . from the bondage of jejune categories and question-begging formulas and thereby enabled them effectively to appreciate that the complexities of life can not be ruled by unreal simplicities of law."[9]

## II

Dismissal of petitioners' tort claim, out of hand, contrary to facts and applicable law is an unsupportable exercise of the judicial process.

We are aware that an argument on the merits has no place in a petition of this kind. However, the errors of the courts below unavoidably will appear as shadows moving

[7] See, e.g., *Dregman v. Morgan County Nat. Bank*, 62 Colo. 277, 162 Pac. 321, 330; semble, *Cahill v. Readon*, 85 Colo. 9, 273 Pac. 653, 655; though these cases proceed on deceit or fraud, the rule should apply, *a fortiori*, to negligent representations.

[8] A dramatic converse corollary is reposing in *Frechd v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407 (allowing recovery *ex contractu* for breach of warranty from pebbles in a plate of beans), and *Ash v. Childs Dining Hall Co.*, 231 Mass. 86, 120 N. E. 396 (denying recovery in tort for tacks in a blueberry pie).

[9] Frankfurter, *Learned Hand*, 75 Harv. L. Rev. 1, 2 (1961).

across our showing to this Court that the courts did, indeed, depart from standards of adjudication upon which the bar must have the right to rely to protect the rights of people.

The gravamen of the charge that the lower courts did so depart can better be assessed if we construct a factual and legal frame of reference out of material contained by the record and then place within that frame the opinions and judgments of the lower courts.

A. Every transaction in the application, issuance and maintenance of a policy of insurance has in it the seeds of two independent, consistent causes of action: one *ex contractu* on the policy as written or reformed, and one *ex delicto* for misrepresentation or fraud. They may be concurrently pursued to satisfaction. *Baldwin v. Travelers Ins. Co.*, *Pacific Employers Insurance Co.*, 9th Cir., 282 F.2d 196, 199-111.[10]

B. The duty, giving birth to a tort action for its breach, arises from the dealings between the parties and is outside the policy written. *DeFord v. New York Life Ins. Co.*, 75 Colo. 146, 224 Pac. 1049. Moreover, the rights of the insureds against the insurers and its agent for torts are not measured by the "rights of principal and agent inter se." *Per* Mr. Justice Douglas in *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575, 583.

C. The duty owed to the insureds was, like the cause of action, certainly existent but of variegated origin. The immediate source is to be found in the broad duty of protection self-confessed by the insurers (pp. 5-6, *supra*). This duty of protection is implicit in the theme songs circulated by the insurance fraternity (App. D, pp. 28-). It is also derived from the particularized duty of the agent (with the aid of the field man) to determine, advise with respect to,

[10] Of academic interest but not for precedential value, see Hunger dissent, 368 U. S. 822.

and meet the insureds' needs for coverage as set forth above at page 5. In addition, since Coe was the licensed agent of the insurers, his duty, to the extent that authority or apparent authority are important, was rooted in state law. C.R.S. '53, sec. 72-1-18 provides, in part, that, "While such license remains in force a company shall be bound by the acts of the person named therein within his or her apparent authority as its acknowledged agent." (App. C, p. 27).

The lineage of the duty, in terms of the principal's liability, can be traced further to "that larger field measured by the general scope of the business entrusted to the agent's care."[11] Judge Hand acknowledged the genesis of this concept in the "ideas of status" ("archaic status", he called it) and doubtedly drew on the observations of Mr. Justice Holmes that shipowners and innkeepers were made liable under common law for wrongs committed without their knowledge because of the "exceptional confidence which was necessarily reposed in carriers and innkeepers. But some of the jurists, . . . explained this new liability on the ground that the innkeeper or shipowner was to a certain degree guilty of negligence in having employed the services of bad men."[12]

It should be observed in our case (pp. 5-6 above) that the insurers' field man and the agent were the insurers' oracles of coverage. Insurance companies are not noted for hiding their lights under bushels; no one should suppose, even for a moment, that they put a "top-secret" label on information as to the varieties and benefits of coverage and instruct their agents to treat it as classified material in their dealings with the insured.

On similar facts of coverage misrepresentations, this Court in *Federal Crop Ins. Corp. v. Merrill*, 332 U. S. 380,

[11] Judge Learned Hand in *Kidd v. Thomas Edison, Inc.* (D.C.S.D.N.Y.) 239 Fed. 405, 407.

[12] Holmes, *The Common Law*, (1881) [1946 reprint] p. 16.

through Mr. Justice Frankfurter, paused to note by way of dictum, at p. 383, "We assume that recovery could be had against a private insurance company."

Recovery was denied, however, because the insureds were held bound (332 U. S., at 384-5) by the published limitation of coverage offered by the federal agency notwithstanding representations of the agent. Mr. Justice Jackson, in a dissenting opinion joined by Mr. Justice Douglas, was prepared to "hold these [federal] agencies to the same fundamental principles of fair dealing that have been found essential in progressive states to prevent insurance from being an investment in disappointment." (332 U. S. at 388). We suggest some of those states.[1] They applied the "fundamental principle of fair dealing" either by allowing recovery in tort or by allowing estoppel to bar the defense of policy exclusion in an action on the policy, or for reformation.

The feeling for holding insurance companies to deal fairly reflected in both opinions in *Federal Crop Ins. Corp. v. Merrill, ante*, was voiced, in an analogous case by Mr. Justice Miller just ninety years ago in *Insurance Company v. Wilkinson*, 13 Wall. 222, 235. "The powers of the agents are, *prima facie*, coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. . . . An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business, for the acts and declarations of the agents within the scope of his employment, as if they proceeded from the principal."

D. We now move to examine how the lower courts ignored, overlooked or rejected the factual and legal frame-

[1] E.g. *Halls v. Hanover Co. of America*, (D.C.S.D. Iowa) 113 F. Supp. 508, affirmed, *sub nom.* Columbia Casualty Co. v. Eubanks Corp., 8th Cir., 215 F. 2d 11; *Henry v. Southern Fire & Casualty Co.*, Tex. App., 330 S. W. 2d 18; *Tobacco Receiving Corp. v. United States Life Ins. & Guaranty Co.*, 185 S. C. 162, 193 S. E. 426.

of the duty owed by the respondents to the petitioners.

a) The district court, as grounds for its judgment, stated (R. 41), "I think the Court will have to grant the motion for directed verdict, whether it be on the [illegible] is that the assurance was without the scope of the authority of the agent, or by virtue of the statute,[1] or by virtue of the fact that Coe, in making the assurance to the plaintiffs, was acting not as an agent for the insurance company. . . ."

The reason that the "assurance was without the scope of the authority of the agent" has no warrant in the law and on the facts recited above. The second reason—"by virtue of the statute"—is treated under our third question (p. 19, *infra*): suffice it to say it applies only to contract actions since it would contravene the Colorado Constitution if applied to torts. And the third reason—Coe was not acting as an agent of the insurers—is patently beyond the frame of reference of the facts and law in this case. Moreover, C.R.S. '53, sec. 72-1-25 (App. C, 27-28), makes the person soliciting and procuring an application, the agent of the insurer. Armed, as Coe was, with information as to coverage and charged, as he was, with the duty to advise as to, and to provide, adequate coverage (paid for by the insureds), how can a court say Coe was not the insurers' agent in the face of factual and legal realities to the contrary?

b) The Court of Appeals did no better except to emphasize by more detail its apparent determination to ignore, reject and overlook the controlling facts and ruling principles of law set forth above.

The court started to wander from the field of torts in the very first paragraph of its rationale (App. A, p. 23): "From the evidence the jury could have found that Coe made wrongful representations as to the insurance cover-

[1] C.R.S. '53, Sec. 72-1-25 mentioned in Opinion (App. A, p. 24, note 2).

age or *erroneously interpreted that coverage*. The question is whether such finding would have justified a recovery in tort against General" (emphasis supplied). The emphasized phrase, relevant to—and relevant only to—a question of contract construction, beguiled the court to reach over into the field of contracts for a ready rule—and that is exactly what happened, as shown by the next paragraph of the opinion: "The question of the liability of an insurance company for negligent representations of an agent in an interpretation of a policy was considered in *Union Life Ins. Co. v. Burk*, 10th Cir., 169 Fed. 2d 235, 239" (App. A., p. 23). The citation is to a contract case! The improvident judicial consequences of that trespass are treated above, on the first question at pp. 9-10.

The Court of Appeals restated the *Union Life* rule (App. A. 24-25) as laying down two tests. As to the first (was the statement made within the scope of the agent's authority?), the court allowed that a general or policy writing agent could bind the company; we agree, *both* as to contract or in tort. Then the court continues (App. A. p. 25): "But this case does not present such a situation. The agency agreement of General authorized Coe 'to receive and accept proposals' for contracts of insurance. Coe, a soliciting or local agent, had no power to bind General on any risk or to write a policy of insurance."

It can be shown that the court unduly circumscribed the authority of Coe; it is enough to say that a recitation of Coe's alleged limited authority is irrelevant to the issue of the petitioners' claims of tort injury. "The rights of principal and agent inter se are not the measure of the rights of third persons against either of them for their torts." (The *Brady* case, *supra*, 317 U. S. at p. 583.)

In applying the second test of its rule (if the statement was not made within the scope of the agent's authority, did it yet come to the knowledge of the company and result in an estoppel?), the court dismissed the petitioners'

contentions on that account also. It is at this point in its opinion that the Court of Appeals expressed a doctrine, it is interesting to note, much like the one discarded by the Romans [15]. (App. A, p. 25): "As to the second (test), there is no claim that the statements of Coe ever came to the attention of General. It may be that some insurance agents in their enthusiasm to produce business make reckless or negligent statements concerning policy coverage. The complexity of modern insurance contracts is such that persons desiring protection understandably place great reliance on the agent who handles their insurance business. If untrained or over-zealous agents make negligent or reckless representations as to policy coverage and it can be shown that the company had actual knowledge thereof or that knowledge may be implied from the circumstances of a particular situation, the company must accept the responsibility. Such is not the case here. There is no evidence that General had actual knowledge of Coe's statements and no evidence from which knowledge may be implied."

By these views, the court placed itself in polar opposition to the philosophy of law now gaining ascendancy in our jurisprudence.[16] The principal is liable by reason of his having selected the agent to act for him with some dis-

[15] See the "bad men" quotation from Holmes, *The Common Law*, p. 16, quoted above at p. 12, n. 12.

[16] At the risk of being thought didactic, we venture to suggest why consideration of the principal's liability in tort for acts of his agent, is a recurring source of trouble for bench and bar. The principal's liability to a third party *ex contractu* rests on two consents, either in fact or in law: (1) the primary consent to the agency relation and (2) the secondary consent, through the agent as conduit, to the contract with the third person; but in assessing the principal's liability to a third party in tort, we are only concerned with the first consent, the consent to the agency relation. Once the first consent is established, inquiry is directed to whether the wrongful act was, or was not, incident to the scope of *agency*, not to the scope of authority. The liability is imposed on the principal by virtue of the agency relation *ex proprio vigore* irrespective of authority, apparent authority or estoppel (see the references to the *Kidd* case and the Restatement Agency 2d immediately following in the text above). Difficulties arise and legal grief follows, from demanding proof from the third party that one of the agent's supply of little consents for acts of contract was attached to the act of tort causing him harm. Consent is immaterial.

cretion thereby signifying his confidence in him and holding him out as worthy of the reliance placed upon him by a third party. The factitious doctrine of estoppel has no place in this theory." All of this is better said by Judge Learned Hand in the *Kidd* case, cited *supra*, 230 Fed. 406, 407-408.)

These views of Judge Hand (to whom has been assigned a "dominant role" in shaping the various Restatements [*fn.* "] quite conceivably bore fruit in 1 Restatement Agency 2d (1958). This current edition indicates progress in the law by adding to the first edition of Restatement Agency (1933) a new Section, "Sec. 8A, *Inherent Agency Power*: Inherent agency power is a term used in the restatement of this subject to indicate the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent." See Comment (a) to the new Sec. 8A.

Surely there can be no custom or practice in business by reason of which one would expect an errant agent to notify, or the insured to question, the principal respecting representations as to coverage. "The very purpose of delegated authority is to avoid constant recourse by third persons to the principal." per Judge Hand, again, in the *Kidd* case, cited above, 230 Fed. 406, at 408.

The unavoidable conclusion is that the principal's liability in tort for the negligence of his agent arises at the time of the tort and is not the subject of a *nunc pro tunc* attachment dependent on *post facto* notice.

If, *arguendo*, the court was correct to insist that knowledge, actual or implied, was required to hold General liable, still the court disclosed an interpretation of Colorado

[fn.] Frankfurter, *supra*, note 9, at 2.

law which is in direct conflict with the concordant decisions of federal and state courts in Colorado. Whether Coe was only a soliciting agent, or was more, is immaterial. "One who solicits or receives an application for insurance on behalf of an insurance company, or transmits to that company an application for insurance, is the agent of the insurance company (citations omitted). The knowledge of the agent under such conditions will be imputed to the principal."—*Mike Occhiato Mercantile Co. v. Alemannia Fire Ins. Co.*, D.C. Colo., 98 F.Supp. 888, at 890. Accord: *United American Life Ins. Co. v. Rebouchek*, (D.C. Colo.), 134 F.Supp. 554,557; *Federal Life Ins. Co. v. Kras*, 96 Colo. 589, 45 P2d 636, at 637; *Merchants Mut. Fire Ins. Co. v. Harris*, 51 Colo. 95, 116 Pac. 143, 147;

Thus, the conclusion is inescapable that the court misapprehended the liability of the principal—for the wrongful acts of Coe—inherent in the principal-agent relation *per se*, because it misapplied the facts or because it misconceived the relevant principles of law. Random error does not concern us; indeed, it is a refreshing reminder that our judiciary remains close to us in terms of fallibility. Here, however, there was more than error—here there was an insufficiency in the adjudicative process. "Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." (Mr. Chief Justice Marshall in *Osborn v. The Bank of the United States*, 9 Wheat. 738 at 866).[18] What ever else may be said of the judgments below, it can hardly be said that they gave effect to the will of the law.

The failure of the courts below to give adequate judicial consideration to the duties and applicable laws con-

[18] This Court (in its formative years) was charged with judicial "arrogance" and "usurpation". The passage quoted, unnecessary to the opinion or decision, was inserted to answer the charges. 4 Beveridge, *The Life of John Marshall*, (1916) 393.

fessed by the principals of the negligent agent, duties so naturally identified with the business of the wrongdoer's principals, and so easily identified as grounds for liability in progressive jurisdictions elsewhere, constitutes a departure in the exercise of judicial power requiring the attention and correction of this Court.

III.

Any force given to C.R.S. '53, Sec. 72-1-25, to exonerate the insurers from tort liability contravenes the Colorado Constitution.

Said Sec. 72-1-25 (App. C, 27-28) in terms exonerates the insurers from any liability based on representations of the agent not contained in the application. But the late Chief Judge Knous (a member of the Colorado Supreme Court before elevation to the federal bench) held, *United American Life Ins. Co. v. Babcock*, (D.C. Colo.) 134 F. Supp. 554, 557, that the statutes did not provide immunity to the companies from the consequences of "misinterpretation, negligence or fraud on the part of the agent" in connection with the application. This is so because the right to acquire, possess and protect property is an "inalienable right" protected by the Colorado Constitution, Article II, Section 3 (App. C, 27), and cannot be taken away by the legislature. *Ace Fly Service, Inc. v. Colorado*, 136 Colo. 19, 314 P. 2d 278, 284 *et seq.* (concurring opinion, Mr. Chief Justice Moore).

Therefore the second reason "by virtue of the statute" (R. 41)—assigned by the district court to defeat the insured's claim violated their constitutional rights. The Court of Appeals found it unnecessary to pass on the question (App. A, 24) and rested its decision on the *Union Life* case *supra*, 169 F. 2d 235, 239) rule of *Bogue* of authority or estoppel. This important question of state constitutional law requires settlement before a new trial can be undertaken.

## CONCLUSION

Wherefore, in the interest, not alone of the petitioners, but also of all other insureds who are tortiously lulled into a false sense of material security, this Court is urged [to] "to tidy up another area of the law"[19] by a restatement of the principles of law controlling the liability in tort of an insurance company for harm to third persons from negligent acts and representations of its agents; (2) to review the sufficiency of the juridical processes of the Tenth Circuit; (3) to rectify departures from what would appear to be accepted standards of adjudication by insisting that relevant principles of law be applied to undisputed facts; and (4) to dispel all doubts, if any there be, that the use in Colorado of C.R.S. '53, Sec. 72-1-25 to exonerate insurance companies from liability in tort for oral mispresentations of its agents, contravenes Article II, Section 3 of the Colorado Constitution.

Certainly, this petition would seem to have more call upon this Court to exercise its discretion favorably than is made to appear, for example, in *Dick* v. *New York Life Ins. Co.*, certiorari granted, 357 U. S. 925; reversed, 359 U. S. 437. The proceedings throughout the *Dick* case were keyed to a unique set of facts which, as Mr. Justice Frankfurter pointed out in dissent (joined by Mr. Justice Whittaker), 359 U. S., at 457, deprives the decision of value as a precedent.

In the case at bar, contrariwise, a resolution of the issues raised will have a profound effect, in a matter "of the greatest public concern," in many precincts of our Nation, especially on those persons who can ill-afford, if at all, to find that the premiums they paid for insurance were only "an investment in disappointment."

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[19] A paraphrase, freely admitted, of an expression in *Sunal* v. *Large*, 332 U. S. 174, 184 (dissenting opinion).

This petition should be granted and a writ of certiorari issued as first-above prayed for.

Respectfully submitted,

JOHN CADEZ, Jr. and
JAMES CADEZ, *Petitioners*

by George S. Graham and
Albin Anderson, *Pro Se*
206 Uranium Building
Grand Junction, Colorado

## Appendix A: Opinion of Court of Appeals

No. 6722 November Term, 1961

(November 15, 1961)

Before MURRAH, Chief Judge, and LEWIS and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This appeal challenges a judgment entered on a verdict directed in favor of the appellee insurance companies (General) in a tort action claiming that General negligently failed to provide the appellants-plaintiff (insureds) with workmen's compensation protection. Jurisdiction is based on diversity.

As the case was withdrawn from the jury, we view the evidence and the reasonable inferences therefrom in the manner most favorable to the insureds. In 1949 Cadez, Sr., the father of the insureds, and a partner named Rader acquired a wholesale distributing business at Grand Junction, Colorado. One Coe, whose testimony was not available at the trial because of his death, was a friend of Cadez, Sr., and an agent, representing several insurance companies, some of which wrote compensation insurance. Cadez, Sr., told Coe that he wanted insurance "that would cover everything" in connection with the distributing business. At that time Cadez, Sr., and his partner did not have a sufficient number of employees to subject them to the Colorado workmen's compensation law.[1] Coe, a local or soliciting agent for General without authority to bind it or to write policies, obtained from General a "blanket liability policy" which specifically excluded coverage of "any obligation for which the insured may be held liable under any Workmen's Compensation Law." The policy was for 3 years and was renewed in 1952 and 1955.

1. The Colorado law, Colo. Rev. Stat. Ann. §81-2-6 (1953), applies to an employer of 4 or more.

Cadez, Sr., bought out his partner in 1951 and in 1953 sold the business to his two sons, the insureds. In 1958 during the life of the 1955 renewal policy and at a time when there were more than 4 people employed in the business, an employee named Hugenot was injured and filed a claim with the Colorado Industrial Commission for workmen's compensation under the state law. The insureds notified General which denied liability on the basis of the policy exclusionary clause. The insureds were required to pay a compensation award to Hugenot plus certain expenses and seek to recover from General the $21,646.25 so paid.

Shortly after the issuance of the first policy in 1949 and thereafter during all the times involved herein, except the fourth quarter of 1955 and the first quarter of 1957, the business had 4 or more employees. On at least one occasion Cadez, Sr., told Coe the business had more than 4 employees and inquired about his protection. Coe replied that he had full coverage. There is no evidence that Cadez, Sr., or the insureds, ever expressly requested insurance against workmen's compensation liability or that Coe ever told either Cadez, Sr., or the insureds that the policy as issued specifically covered workmen's compensation liability. No evidence was introduced as to any statements or representations by any one in connection with the issuance of the 1955 renewal policy.

From the evidence the jury could have found that Coe made wrongful representations as to the insurance coverage or erroneously interpreted that coverage. The question is whether such finding would have justified a recovery in tort against General.

The question of the liability of an insurance company for negligent representations of an agent in an interpretation of a policy was considered in *Union Life Ins. Co. v. Buck*, 10th Cir., 169 F. 2d 235, 239. We held that such representations "would not bind the company unless they

were made within the scope of his authority, or, if not warranted by the scope of his authority, they nevertheless came to the notice of the company, and by its subsequent conduct it estopped itself to repudiate them." Although this principle was announced in a case arising in New Mexico, our attention is directed to no Colorado statute or decision which negates the applicability of the rule in Colorado.

The parties differ as to the meaning and applicability of the Colorado statute[2] providing that no statement made to or by an agent and not contained in an application shall be taken as having been brought to the knowledge of the company or as charging it with any liability by reason thereof. In a number of cases Colorado has construed this statute as no preventive to recovery from an insurance company when there was a misstatement of facts in an insurance application in such circumstances that the agent had knowledge of the misstatement.[3] In other cases it has been applied to prevent recovery.[4] Regardless of whether the statute is concerned only with actions sounding in contract or applies also to torts actions and whether the statute concerns only statements either made in or omitted from insurance applications, we see nothing therein or in the Colorado decisions which detracts from the applicability of the rule which we stated in the *Union Life* case. That decision lays down two tests, viz: (1) was the state-

2. Colo. Rev. Stat. Ann. §72-1-25 (1953).

3. Constitution Life Ins. Co. v. Rogerson, 130 Colo. 26, 273 P. 2d 1019, 1022; New York Life Ins. Co. v. Hana Fukushima, 74 Colo. 246, 220 Pac. 994; Northwestern Mut. Life Ins. Co. v. Farnsworth, 60 Colo. 521, 153 Pac. 699. See also United American Life Insurance Company v. Rebarchek, D. C. Colo., 134 F. Supp. 554, 557.

4. Benson v. Bankers Life and Casualty Co., 147 Colo. , 362 P. 2d 1059 (misstatement by agent as to requirements of company for dispute of prior illnesses); Warner v. Farmers' Automobile Inter-Insurance Exchange, 101 Colo. 359, 96 P. 2d 965 (attempted waiver of forfeiture clause by agent); and Commonwealth Casualty Ins. Co. v. Kuhn, 75 Colo. 175, 225 Pac. 251 (authority of agent to bind company as to effective date of insurance).

ment made within the scope of the agent's authority, and (2) if not made within the scope of that authority, did the statement come to the knowledge of the company and result in company action which precluded the company from repudiating the statement.

As to the first, we have no doubt that negligent representations as to policy coverage when made by a general agent or by a policy writing agent are binding upon the agent's principal. But this case does not present such a situation. The agency agreement of General authorized Coe "to receive and accept proposals" for contracts of insurance. Coe, a soliciting or local agent, had no power to bind General on any risk or to write a policy of insurance. The policy was written in Denver and then forwarded to Coe for delivery to the insured. If Coe's statements are considered as an erroneous interpretation of the insurance contract rather than a wrongful representation, the result is the same as we have said that the interpretation of contracts of insurance is not within the scope of authority of an agent such as Coe.[5]

As to the second, there is no claim that the statements of Coe ever came to the attention of General. It may be that some insurance agents in their enthusiasm to produce business make reckless or negligent statements concerning policy coverage. The complexity of modern insurance contracts is such that persons desiring protection under standably place great reliance on the agent who handles their insurance business. If untrained or over zealous agents make negligent or reckless representations as to policy coverage and it can be shown that the company had actual knowledge thereof or that knowledge may be implied from the circumstances of a particular situation,

5. Cf. Smith v. Orion Insurance Company, 10th Cir., F. 2d, decided November 3, 1961.

6. United Pac. Ins. Co. v. Southeastern Nat. Ins. Co., 10 Cir., 187 F. 2d 445, 447-448.

the company must accept the responsibility. Such is not the case here. There is no evidence that General had actual knowledge of Coe's statements and no evidence from which knowledge may be implied.

The insureds point out that representatives of General audited the insureds' books to determine premium amounts and that such audits disclosed the existence of more than 4 employees. This might have been pertinent had there been any notice to General that the insureds desired or thought they were getting protection against workmen's compensation liability but the record shows no such notice.

Reliance is also placed on the payment of a $15 claim on account of an injury to an employee named Provo in 1957. It is without persuasive effect as the evidence is that the payment was for medical expense within the medical payment coverage and that no compensation claim was asserted by Provo.

Affirmed.

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## Appendix B: Judgment of Court of Appeals

### Judgment

Third Day, November Term.

Wednesday, November 15th, 1961

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

## Appendix C: Pertinent Text of Applicable Constitutional and Statutory Provisions

Vol. 1, C.R.S. '53, p. 246: **Constitution of Colorado:**

"**Section 3. Inalienable rights.** All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."

Vol. 3, C.R.S. '53, Sec. 72-1-18 (1960 supp. pp. 916-917):

"**Licensing of agents.** (1) Every such company shall, through its proper officer or agent, promptly notify the insurance commissioner in writing of the name, title and address of each person it desires appointed to act as agent in this state. . . . [the] insurance commissioner shall issue to such person a license which shall state, in substance, that the person named therein is the constituted agent of the company in this state for the transaction of such business as it is authorized to transact in this state and for which such appointee shall have qualified.

(7) While such license remains in force a company shall be bound by the acts of the person named therein within his or her apparent authority as its acknowledged agent."

Vol. 3, C.R.S. '53, Sec. 72-1-25, p. 931:

"**Person held to be agent, when.** Any person who shall solicit and procure application for insurance shall be held to be the company's agent, whatever conditions

or stipulations may be contained in the policy or contract in any controversy between the parties to the contract, or between the parties to the contract and the beneficiary . . . : but no statement or declaration made to or by an agent, examiner or other person, not contained in the application shall be taken or considered as having been made to or brought to the notice or knowledge of the company, or as charging it with any liability by reason thereof."

## Appendix D: Representative lyrics of insurance company Lorelei

1. **"Key to your planning—THE HARTFORD AGENT.** Developing a protection program that is right for you requires the services of a knowledgeable professional—The Hartford Group Agent. He has all the facts on insurance. Through understanding your needs, he can prescribe an insurance plan to meet them. Because he represents The Hartford—a full-line organization which offers insurance of every kind including home, car, life, and health—he can objectively analyze your requirements overall, and then balance your insurance dollars to fit them best. . . . The Hartford Agent in your community is probably listed in the Yellow Pages under Hartford Insurance." *Sat. Eve. Post*, February 3, 1962, p. 63.

2. ". . . There's an experienced insurance expert like George Weber near you. He'll show you how you can improve your coverage and lower your costs . . . by dealing directly with a team that spots trouble before it begins. There's a fully-staffed American Mutual office listed in the Yellow Pages." *Newsweek*, January 15, 1962, p. 10.

3. "Your Sentry Insurance man specializes in the friendly help you need in looking out for your own. Help in putting all your insurance on a sensible, planned basis. Help in saving money on your insurance premiums. Help in

making sure you have no dangerous gaps in your insurance . . . and no expensive overlaps of coverage. Why not let your local Sentry Insurance man tell you more about our straightforward way of doing business. You're under no obligation. He is our full-time, direct representative . . . and the job he's paid to do is helping you. Look for us in the yellow pages." *Newsweek*, January 27, 1962, p. 10.

4. ". . . In the United States alone, Royal-Globe has 175 field offices and over 18,000 agents qualified to write insurance for every type of risk. **For intelligent protection, you would do well to see the independent agent who represents Royal-Globe!**" *Saturday Evening Post*, February 3, 1962, p. 2.

5. **"Courting trouble?** You may be . . . right now. From a customer in your store. A visitor on your business premises. Someone who's bought your product. The owner of a building you've constructed. The simplest incident — a slip on a floor—can lead to a lawsuit that may cost you plenty. If you have a business establishment of any kind, are the owner, lessee, or contractor, a Maryland Comprehensive General Liability Policy protects you financially against unforeseen events that may end in bodily injury, death or property damage. If you are sued, your legal and court expenses are paid. Also, all legitimate claims against you are paid up to the limit of your policy. See your local independent Maryland agent, or broker, today. Remember: *because he knows his business, it's good business for you to know him.*" *Newsweek*, February 5, 1962, p. 7.